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NO. _____

In the Supreme Court of the United States

October Term, 1975

DANA I. KESTENBAUM,
Petitioner,

VS.

FALSTAFF BREWING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dana I. Kestenbaum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 16, 1975, as corrected on October 15, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 514 F. 2d 690. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1975. A timely filed Petition for Rehearing and Petition for Rehearing En Banc was denied on October 15, 1975, and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1245(1).

QUESTIONS PRESENTED

First Question

The Court of Appeals held that the Plaintiff, a former Falstaff distributor, suffered no compensable injury from the Defendant Brewing Corporation's admittedly wrongful price fixing activity. This holding was reached against a background of facts which revealed that, during the pertinent period, Falstaff required Kestenbaum to set his price at a level fixed by other local wholesalers of "popular" beers and stay a certain amount below the price of "premium" beers and to "clear" each price change with Falstaff. Each time a change approved by Falstaff resulted in a price increase, Falstaff automatically "took" one-half of the price increase, i.e., added one-half of the price increase to the price charged Kestenbaum. Mr. Kestenbaum testified that in reasonable probability he would have stayed competitive with the price of the local "popular" beers without direction from Falstaff. There was no evidence that Falstaff would have increased its price to Kestenbaum in the absence of the price fixing scheme, i.e., there is no evidence that any price increase to Kestenbaum would have been made except as part of the price fixing mechanism.

The Court of Appeals also held that loss due to "price promotions" (conceded to be "price fixing") was not

recoverable where the evidence did not show which promotions were voluntary and which were coerced, even though it was undisputed that adherence to the price fixing and resultant loss was required by Falstaff regardless of whether the distributors participation was voluntary or coerced.

Therefore, the first question is in two parts:

1. (a) Does a price increase by a seller which is tied to or "coupled with" a price fixing requirement imposed on a buyer afford a basis for proof of injury and measurement of damages resulting from the per se violation?

   (b) Is a distributor prevented from recovering damages resulting from a price-fixing "price promotion" scheme because participation in some promotions was voluntary, where it is undisputed that adherence to price fixing was required by Falstaff regardless of whether participation was coerced or voluntary?

Second Question

In the second section of the opinion of the Court of Appeals it is held that the trial court erred in instructing the jury that if it found that Falstaff dictated the sale price to Kestenbaum's distributorship, Falstaff would be guilty of a per se violation of the antitrust laws. The lower court concluded that Falstaff could legitimately restrict the price at which Kestenbaum could sell his business, disregarding "rule of reason" considerations. Though the portion of the court's opinion dealing with this question focuses on the per se violation of price fixing, the context within which the conclusion was reached is slightly broader. The evidence revealed that not only did Falstaff control the price at which Kestenbaum could sell his dealership, Falstaff also controlled the person(s) to whom it could be sold. This raises a question of the "outlet" type of restraint con-

demned in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365. Thus the question raised by the second section of the lower court's opinion may be stated:

> 2. Do restrictions upon the price at which and the person(s) to whom a distributorship or franchised business may be sold amount to per se violations of the Sherman Act?

Third Question

In the third section of the lower court's opinion, it is held that the trial court erroneously submitted to the jury an issue as to whether Falstaff was guilty of restraining sales to customers outside Mr. Kestenbaum's prescribed geographical area. The opinion indicates that this was erroneous because the instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs, conceded to be legitimate damages arising from territorial restrictions imposed by Falstaff. The references to restraints on sales to customers outside Kestenbaum's prescribed geographical area, in the trial court's charge to the jury, are within the context of definition of the per se violation of territorial and customer, or "outlet", restriction. There was no proof of any loss resulting from failure to make sales to any customer outside the prescribed geographical area, and there was no claim by the Plaintiff that any such loss occurred. Furthermore, the Respondent failed to object to the instructions and waived any possible error. Therefore, the third question is also in two parts:

> 3; (a) Do explanatory instructions regarding the offense of territorial restriction, which make reference to restrictions on sales to customers outside a prescribed geographical area, require reversal where the plaintiff makes no claim for damages resulting from loss of sales to customers outside such territory, and the proof is such that the jury could not be con-

3. (a) fused with regard to the type and amount of damages claimed?

   (b) Did Respondent waive any possible error regarding such instructions by failure to object?

Fourth Question

In the fifth and final section of the lower court's opinion the conclusion is reached that a showing of "public injury" is still required in the proof of a non-per se violation under Section 1 of the Sherman Act. Actually, the observations of the Court of Appeals are surplusage, since the trial court instructed upon public injury. Those instructions were not attacked and there is no indication that the proof was not sufficient to sustain a jury finding of "public injury". However, Falstaff urged contentions which equated proof of "public injury" with proof of specific injury to competition. The Court of Appeals correctly held that proof of specific injury to competition is not required, but mixed and apparently used interchangeably the concepts of "public injury", "restraint of trade", "unreasonable restraint of trade", and "rule of reason". Therefore, the fourth question is:

4. Is proof of "public injury" as a separate element in the "rule of reason" test still required in the proof of a non per se violation of the Sherman Act?

STATUTE INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, which provide in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracty, in restraint of trade or commerce, among the several states, or with foreign

nations, is hereby declared to be illegal."

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent: . . ."

STATEMENT OF THE CASE

In 1934, Dana Kestenbaum's father, Sam Kestenbaum, secured a Falstaff beer distributorship for Milam, Robertson, Burleson, Brazos, Falls and Bell Counties, Texas. (R. 24) In 1937 Bell County was given to the distributor in Temple, Texas. at the direction of Falstaff. (R. 24) Nothing was paid to Sam Kestenbaum for the loss of distribution rights in Bell County. (R. 25)

Sam Kestenbaum continued to operate the distributorship in the remaining counties until approximately 1950 when Dana Kestenbaum became an active partner. (R. 25) In 1967, Dana Kestenbaum took over the distributorship and operated it until its termination. (R. 25)

In the earlier years, the distributorship was operated without a written agreement. (R. 31, et. seq.) During the 1960's Falstaff and the Kestenbaums entered into three separate franchise agreements covering the four counties then comprising the distributorship. (R. 34-35) Each franchise agreement (of which P. Ex. 1, covering Milam and Robertson Counties is an example) covered a different county or counties. At Falstaff's direction, warehousing and distribution facilities were maintained in each of the three continguous territories covered by the agreements. (R. 25, 26, 27, 41, 42, et. seq.) The distributorship operated under the three original written agreements until terminated. Falstaff's basic policies and operating procedures with relation to the distributor, both as specified in the franchise agreements and "ex contractu", remained basically the same before and after the agreements were signed

The franchise agreement defines and delineates certain

obligations and responsibilities of the distributor and the Falstaff Brewing Corporation. Under its terms, the distributor is, except to the extent of the obligations imposed by the agreement, ostensibly a free and independent businessman. In truth and in fact, however, Falstaff imposes many requirements upon the distributor which are not embodied in the franchise agreement, and which are in addition to the terms of the agreement. Falstaff is enabled to require adherence to these requirements because it is economically more powerful than the individual distributor, controls the distributor's source of supply, retains the arbitrary and unfair right of cancellation upon short notice (which could operate to inflict severe financial loss upon the distributor), and retains the right of approval of any purchaser of the distributorship. (See P. Ex. 1, paragraphs 5, 6(a) and discussion of Kestenbaum's testimony relating to direct and implied threats by Falstaff and his fears of cancellation.)

The distributorship arrangement amounts to a system of territorial and customer allocation whereby each distributor sells, and is permitted to sell only to customers located within the territories specified by the written or verbal agreements with Falstaff. (R. 32, 33, 118) This allocation and market division has been firmly and resolutely maintained by Falstaff through the years. (R. 32, 33) In addition, at all times while Kestenbaum was a distributor, Falstaff fixed the prices at which he sold beer to retail accounts. (R. 44-45, 46, 47.) For a greater portion of the period of existence of the distributorship, i.e., until approximatley 1966, Falstaff fixed the prices directly by instructing Kestenbaum to change his price to a certain amount at a certain time. (R. 44) During the last few years of the distributorship the system changed slightly, and the Plaintiff was instructed to "do what the others do" (referring to other beer wholesalers in the area) within guidelines established by Falstaff, i. e., Plaintiff was instructed to maintain his retail price at a certain level below Budweiser and Schlitz (the "premium" priced beers) and to "stay competitive" with (that is, to charge the same as) other local or "popular" brands. (R. 45, 46, 47) When, in acting pursuant to these directions, Kestenbaum secured a price increase, Falstaff took one-half of the increase,

i.e., raised its price to Mr. Kestenbaum by an amount approximating one-half of the increase. (R. 45-46)

Falstaff also periodically required Mr. Kestenbaum to engage in "price promotions". Certain price promotions were on an ostensibly voluntary basis, but others were mandatory. (R. 52) Pursuant to these price promotions, Mr. Kestenbaum was instructed to sell at a certain discount off regular price. (R. 53, et. seq.) Mr. Kestenbaum would stand one-half of the loss resulting from the decrease, and Falstaff would stand the other one-half of the decrease. Ibid. Regardless of whether voluntary or involuntary, all price promotions were originated by Falstaff, and compliance therewith by Kestenbaum, whether voluntary or coerced, amounted to a prohibited form of price-fixing, which resulted in a loss to Mr. Kestenbaum on every case sold during such promotion.

According to Mr. Kestenbaum's testimony, commencing in the early 1960's, and continuing through the termination of the distributorship, Falstaff, operating from the vantage point of the restrictive franchise agreement, with its short-notice termination provision and requirement for approval by Falstaff of any purchaser of the business, imposed arbitrary operating requirements upon Mr. Kestenbaum and required his participation in various programs which caused him excessive expenditures without commensurate increase of business.

In 1961, Falstaff gave Mr. Kestenbaum the choice of meeting certain arbitrary requirements or surrendering Falls County. Mr. Kestenbaum chose the latter alternative and was thus economically coerced to give up his franchise rights in Falls County without compensation. (Because of limitations, no effort was made to prove damages resulting from the loss of Falls County, and the court gave the jury an instruction to disregard the loss of Falls County in assessing damages. The evidence was admitted, without objection, as proof of the continuing practices and policies of Falstaff.)

Continuing thereafter, Mr. Kestenbaum was subjected to various practices increasing the expenses of operating his business without producing offsetting income. These practices included the following:

(a) Requiring Mr. Kestenbaum to establish and maintain warehouse facilities in Caldwell, Cameron and Bryan, thereby causing unnecessary inventory to be stockpiled, which increased interest expense, insurance, transportation costs, and expenditures for establishment and maintenance of the unnecessary warehouses;

(b) Demanding that Mr. Kestenbaum expend money for bar spending and exerting pressure throughout the period to increase bar spending, resulting in excessive bar spending without producing commensurate increase in business;

(c) Requiring participation in the distributor advertising programs, which did not produce additional business to off-set the expense involved;

(d) Supervising Plaintiff's operations, making unwarranted criticism and threats of termination by institution of "corrective" measures, which was disruptive and inhibited effecient operation of Plaintiff's business;

(e) Imposing arbitrary requirements regarding method of transportation and points of delivery of beer; and

(f) Refusing to allow Mr. Kestenbaum to close either the Caldwell or Cameron warehouses, while at the same time indicating that the two warehouses could be closed if Mr. Kestenbaum would move to Bryan and operate out of the Bryan warehouse, and then refusing to allow Mr. Kestenbaum to operate out of the Bryan warehouse unless he moved to Bryan.

Becasue of these practices and the resulting unprofitable operation, in the early part of 1971 Mr. Kestenbaum sold the remaining parts of his distributorship (distribution rights in the remaining four counties). The act of selling was not voluntary but done because no other reasonable course was offered. Mr. Kestenbaum was forced to salvage as much as he could from his investment in the business. But Mr. Kestenbaum was not allowed to freely select a buyer and negotiate a sale at arm's length. Falstaff, in effect, dictated the sales price that Mr. Kestenbaum was to obtain and allowed him to sell only to persons approved by Falstaff, thereby causing the loss of one sale and requiring sale on considerably less favorable terms than Mr. Kestenbaum could have negotiated with a willing, qualified buyer.

Against this general background, Mr. Kestenbaum contended, and the jury agreed, that the arrangement between Falstaff and its distributors, including both the terms contained in the written franchise agreement and the additional requirements made of the distributors either through voluntary agreements or coerced compliance, amounted to a "contract, combination, or conspiracy" in restraint of trade. This illegal arrangement contained features of price-fixing and restraints on sale of property (including customer and territorial restrictions) coupled with the arbitrary, contractual, short-term cancellation provision and restriction upon sale or alienation of the distributorship (which, in effect, served as the "enforcement" mechanism). Mr. Kestenbaum contended that through use of this illegal arrangement (coupling contractual terms with enforced "ex contractu" practices) he was coerced, both economically and by direct and implied threats, to comply with requirements by Falstaff which increased his cost of operation, and was forced to sell his distributorship without realizing the full market or "good will" value.

The jury awarded Mr. Kestenbaum exactly one-half of the amount of actual damages he claimed. The Fifth Circuit Court of Appeals remanded for the reasons which are the subject of this petition.

REASONS FOR GRANTING THE WRIT

1.

Price Fixing - Sale of Beer

In the first section of the opinion, the Court of Appeals holds that (1) the petitioner Kestenbaum failed to prove either the fact or the extent of injury resulting from Falstaff's fixing of the price at which he sold beer to retailers, and (2) that Plaintiff could not recover for losses due to price promotions without showing the proportion of the total cost attributable to voluntary, as opposed to involuntary promotions.

It is respectfully submitted that the Court is in error with

regard to both propositions.

(a) The Plaintiff was entitled to recovery of the amount arbitrarily exacted by Falstaff in connection with price increases made pursuant to the price-fixing scheme.

The lower court's opinion characterizes Falstaff's retail price maintenance scheme as a directive to stay competitive with other local or "popular" brands, coupled with a policy of automatically raising the selling price to Kestenbaum by one-half of the amount of any price increase imposed in adherence with the directive. This is correct, insofar as it goes. However, it ignores essential aspects of the price fixing scheme.

The proof shows that prior to 1966, Mr. Kestenbaum would receive calls from Falstaff telling him to go to a certain price on a certain date. Under this system, other beer distributors with whom Mr. Kestenbaum competed operated on the same basis, i.e., were told to set certain prices on certain days (R. 156):

> "A. Yes, they were told to go up, one on a Monday, one on a Tuesday, one on a Wednesday, and so on down the week."

When this system changed in 1966, Mr. Kestenbaum was told by Falstaff that if there was a price change "in the territory" he should meet the price of the popular priced beers and stay a certain amount below the "premium" beers and Falstaff would "take" one-half of the price increase. Regardless of the system used, Mr. Kestenbaum testified unequivocally that his price was always established by Falstaff (R 47):

> "Q. Were you ever, while you were operating, free to go up on your price individually as an independent businessman and take advantage of any profits that might accrue from your raising the price?
>
> "A. No, sir, I was told to follow their guidelines.

> Whatever they said was the price was what I was to follow."

Under the "new" system, Mr. Kestenbaum was required to call Falstaff and get approval before putting price increases into effect (R. 165). Other distributors operating in the area were also told to raise their prices, in effect, by agreement, so as to "do what the competition does". (R. 156). Thus, the only effect of the change in the system was to transfer the price fixing from the brewery level to the distributor level, with control still vested in the brewery. Not only was Mr. Kestenbaum's price artificial, but prices of competing distributors were likewise artificial.

Clearly, therefore, the testimony does not establish the "propriety" of the price of the beer sold by Mr. Kestenbaum, as indicated by the Court of Appeals' opinion. The proof shows without dispute that the price dictated by Falstaff was one corresponding to the atrificial price existing in the industry, and it can hardly be said that such price was "logical and proper". It is true that Mr. Kestenbaum testified to the effect that in all probability he would have remained competitive with other popular brands even without the control exercised by Falstaff. However, contrary to the Court's opinion, this serves to establish rather than defeat the right of recovery, and to measure the extent of the injury.

The fact that Mr. Kestenbaum would have "remained competitive" in the absence of directions from Falstaff establishes the level at which Mr. Kestenbaum would have sold his beer if the price fixing scheme had not existed. Under such circumstances, i.e., if the price fixing scheme had not existed, Mr. Kestenbaum would have received the full measure of the price increase, rather than one-half of the price increase. The automatic price increase by Falstaff of one-half of the distributor's "fixed" increase, was "part and parcel" of the price fixing scheme and cannot be divorced therefrom. The erroneous conclusion that this Court reached is embodied in the following sentence from the Court's opinion:

> "While Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis of proof of injury even though it is coupled with a price ceiling requirement which is a per se violation."

To say that the increase is not itself violative of the antitrust laws is to dissect and view the price fixing scheme piecemeal, contrary to all previous antitrust teaching. The Appeals Court donned judicial blinders and accepted the proposition that Falstaff's increases to Kestenbaum stood on their own bottom, free from the taint of price fixing, and were in pursuit of Falstaff's undisputed right to set its sales price. This ignores all the evidence on the point in the record which is to the effect that Falstaff's price increases were tied to and were an integral part of the scheme by which Falstaff controlled the distributor's price.

Accordingly, by proof of the amount that would have been charged in the absence of the price fixing scheme, and proof of the mechanical application of the price fixing scheme, Mr. Kestenbaum has demonstrated a direct loss of one-half of the amount of the price increases during the pertinent period. This establishes the measure of damages, and entitles Mr. Kestenbaum to recovery, contrary to the Court's assertion that the increase in price does not "afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a *per se* violation". The very statement of the proposition contains its refutation. If a price fixer, such as Falstaff, controls the resale price of its coerced victim and, pursuant to the same price fixing scheme, sets and controls the victim's margin of profit, the victim is obviously entitled to recover the amount by which his profit would have been increased in the absence of the price fixing scheme.

This does not affect the right of Falstaff to increase its prices, whether the increase be arbitrary or justified. But there is no proof in the record, and no contention was made in the trial court, that any price increase by Falstaff was justified on any basis, or made for any reason other than as part of the price

fixing scheme. If there was any other justification for Falstaff's price increases, or if the price increases were anything other than a part of the price fixing scheme, the burden was upon the Defendant Falstaff to introduce proof to that effect. It wholly failed to do so.

The net effect of the lower Court's opinion is that in order to recover damages for price fixing, all aspects of the price fixing scheme except the resultant artificial price must be ignored, and damages must be supported and measured by the difference in the artificial price and the price which could and would have been set in the absence of the price fixing scheme. This approach would make it virtually impossible for one whose resale price is fixed to recover damages, for price fixers invariably cause a price to be set which is as high as or higher than the price which would have been set if the price fixing scheme had not existed. Obviously, this is totally unrealistic, and is not sanctioned or supported by any known authority.

If the price fixing scheme, when viewed in its totality, serves to reduce the profits of the one whose price is fixed, and where the reduction is not explained or justified on any basis other than application of the mechanism on the price fixing scheme, recovery of the reduction in profit is authorized. To hold otherwise is unsound, and imposes a stricture on proof of damages in antitrust cases which is not only without foundation, but is in fact contrary to the rationale of those decisions relating to damages which are recognized in the Court of Appeals' opinion.

It is well settled that a plaintiff in a price fixing case who is compelled to pay a higher price for any article affected by the price fixing scheme that he would otherwise pay is entitled to recover the entire amount which would have been paid absent the violation. *Monarch Tobacco Works v. American Tobacco Company,* 165 F. 774 (e.c. Ky. 1908); *Wall Products Co. v. National Gypsum Co.,* 357 F. Supp. 832 (U.S.D.C., N.D.Cal. 1973). This is exactly the damage suffered, and proved, by Kestenbaum, i.e., a higher price paid for beer directly stemming from a price fixing scheme. Recover should have been allowed.

(b) Damages for price fixing in the form of price promotions should be sustained.

The Court of Appeals' opinion holds that although price promotions are a form of prohibited price fixing, Plaintiff failed to establish the right of recovery of damages because he did not distinguish voluntary from involuntary promotions.

It is true that Mr. Kestenbaum testified that he voluntarily participated in some of the price promotions, while others were forced upon him against his will. However, the voluntariness of the price promotions does not furnish the criteria for recovery. In order for Mr. Kestenbaum, or any other distributor to participate in price promotions it was required that he agree to (1) set the price dictated by Falstaff, and (2) suffer loss of one-half of the decrease in price. Had a price allowance been extended to encourage a price promotion, and the price fixing aspect (i.e., establishment of the decreased wholesale price) been eliminated, Mr. Kestenbaum, and other distributors, could have elected to participate by establishing their prices at a level which would not cause loss to them. Under Falstaff's scheme, however, the distributor was required to set the price dictated by Falstaff and thus suffer one-half of the down-price, in order to participate in any price promotion. The loss to the distributor was, therefore, directly caused by the prohibited price fixing, regardless of whether the agreement was induced by the distributor's desire to participate in price promotions, or whether he was forced to participate in price promotions against his will. The determining question is not whether the price promotions were voluntarily pursued by the distributor, but whether the distributor voluntarily suffered one-half of the loss resulting from the decreased price. It is obvious that the distributor was given no choice in the matter. If he desired to participate in a price promotion, he was required to suffer loss as the cost for doing so. This loss was a direct result of price fixing.

Of course, it might be argued that Falstaff was not required to lower its price in order to encourage price promotions. This, however, beggars the point. Falstaff did offer a program of lowered prices in return for participation in price promotions.

Having elected to do so, it could not legally dictate to the distributor the price at which the distributor sold, or require the distributor to suffer any loss by virtue of participation in the price promotion. See the discussion in *Lehrman v. Gulf Oil Corporation*, 464, F. 2d 26 (5th Cir. 1972) Cert. Den. 409 US 1077. The distributor should have been left free to decline to participate in the price promotion, or, if he elected to participate to determine whether he would suffer any loss by virtue of decreased profit margin, and, if so, how much. Since the price-fixing "promotion" scheme employed by Falstaff arbitrarily inflicted upon the distributor a certain amount of loss, the distributor should be allowed to recover that loss.

2.

Price Fixing - Sale of Business

In the second section of its opinion, the Court of Appeals holds that Falstaff may fix a price, without being guilty of price fixing. This is done, so far as can be determined, without the benefit of any direct supporting authority and must be considered a holding "of first impression".

The Court's conclusion that Falstaff could legitimately restrict the price at which Kestenbaum could sell his business (disregarding "rule of reason" considerations) is based upon Falstaff's asserted interest in the selection of the class of persons with whom it would agree to continue a Falstaff franchise, and Falstaff's interest in the financial vitality of a new franchise.

Conceding the legitimate existence of these interests, it is clear that their ends can be served without the necessity of committing acts traditionally held to be violations of the antitrust laws. Experience, capability, and capital requirements for new franchisees can be fairly and uniformly established and applied in a manner that will allow the distributor to remain free to negotiate for and obtain a price representing the true value of his business.

Fixing the price at which the distributor can sell his business has no more justification than fixing the price at which the

distributor can sell beer. The price paid for the business has only an incidental relationship to the "financial vitality of a new franchisee", which is directly determined by a new franchisee's net worth and possession of sufficient capital to properly operate the business. If a willing seller and a willing buyer negotiate in good faith, it is presumed that they arrive at the market value of the property rights being sold. If the sales price is indeed the true market value, it follows that Falstaff need not be concerned with the purchaser's chance of realizing "a reasonable return on his investment" for such "chance" is obviously present when fair market value is paid. If the purchaser pays more than a fair market price, Falstaff still need not be concerned if the purchaser has the ability and financial resources to properly operate the business. If Falstaff arbitrarily fixes the price at which a distributor can sell his business, Falstaff is guilty of price fixing and price fixing is a per se violation. If the price so fixed is less than the true market value of the business, recoverable damages result.

Falstaff's only legitimate concern with the financial arrangements relating to the sale of a distributor's business is that a new franchisee have sufficient ability and capital to properly operate the business. It is for the purchaser to determine whether he has made a good or bad bargin, and not Falstaff. It is also for the purchaser to determine whether he has a chance to realize a reasonable return on his investment, and to determine how much "return" is "reasonable". The statement in the lower court's opinion that:

> "If the purchaser of a franchise makes a bad bargain when he buys, he cannot give the distributorship the solid, concerned management which it must have to be successful for him and to enhance Falstaff's image and relative position in the market"

is certainly too broad and general to be true (it is also irrelevant). In the modern age of complex tax laws and loop holes, persons or companies very capable of providing "solid, concerned management" may very well desire to make just such a "bad

bargain". Other considerations may also motivate the purchaser to pay an amount Falstaff might not consider reasonable. But the effect of the Appeals Court's opinion is to deprive a seller of the benefit of making such a bargain, or any bargain except that determined by Falstaff, without redress unless the seller can discharge the onerous burden imposed by the "rule of reason".

A rose is a rose, and price fixing is price fixing. This concept should not be sacrificed merely because the price fixing is done in the context of the sale of a franchised business. The owner of the business should be left free to sell to anyone within the legitimately determined class of qualified purchasers. If the sale results in the realization of true or fair market value (as will be true in virtually 100% of the cases) then, by definition, a "good", or fair bargain will result which will allow a reasonable return on investment. If the seller derives more than the true market value then Falstaff will legitimately be concerned with determining whether the purchaser has sufficient capitalization to properly operate the business and retire the indebtedness, and might properly refuse to continue the franchise with the proposed new franchisee if reasonable capital requirements are not met. However, in no event does Falstaff have a legitimate interest in or a right to set, fix, control, or dictate the price at which a distributor can sell his business to an otherwise qualified purchaser.

There is no valid distinction between this type of price fixing and any other type. This proposition is illustrated by the recent Supreme Court case of *Goldfarb v. Virginia State Bar,* Dkt. No. 74-70, decided June 16, 1975, wherein it was held that minimum fee schedules utilized by attorneys charging for service in examining land titles constitute price fixing in per se violation of Section 1 of the Sherman Act. *Noble v. McClatchey Newspaper,* 1972 Trade Cases, Section 561, holds it is a violation to combine to prevent plaintiff from selling his distributorship as a "going concern". *A fortiori,* it is illegal to fix the price of sale of a distributorship so as to prevent realization of going concern value. However, the lower court's opinion carves a special niche for fixing the price of sale of a business, and injects dangerous precedent into the stream of antitrust law which may and un-

doubtedly will be used to justify attempts to erode settled concepts, and sanction other types of price fixing contrary to the spirit and intent of the antitrust laws.

3.

Territorial Restrictions – Damage Instructions

The third point in the lower court's opinion is that the trial court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside Mr. Kestenbaum's prescribed geographical area. The opinion indicates that this was erroneous because the instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs.

In holding that error resulted, the opinion operates on the assumed basis that customer restrictions, and territorial restrictions, in the context of this case, are wholly separate offenses. This is a misconception.

The inherent vice of a "territorial" restriction is that a seller is restricted to making sales only to customers within a prescribed geographic area. Without the vertical confinement of sales to customers within the area, there is no territorial restriction. The two are inextricably intertwined, and the offense of territorial restriction necessarily comprehends confinement of sales to customers within a prescribed territory.

Therefore, the basic offense of territorial restriction requires, for proper definition, the instruction given by the trial court. The correctness of these instructions is not challenged, but in some manner, not fully understood by the writer, the Court's opinion advocates the proposition that including the instructions relating to restrictions on sales to customers may have confused the jury insofar as the award of damages is concerned.

It was Mr. Kestenbaum's contention in the trial court that the maintenance of a warehouse in each separate territorial area granted Plaintiff by Falstaff pursuant to three separate distributorship agreements was an unnecessary expense directly

caused by the prohibited territorial division practice, The Court of Appeals accepted this as a valid proposition and recognized the unnecessary warehouse expense as a recoverable element of damages attributable to the territorial restriction. How, then, can it be error to properly define the offense of territorial restriction? If the record admitted any possibility that the jury might have awarded damages for loss of sales to customers outside the assigned territory, then the ascribing of error might be justified. It would not be corrected, however, by eliminating reference to restrictions on sales to customers outside the assigned territory, for this would result in an incomplete (and confusing) definition of the per se violation. Such an error would properly be corrected by an affirmative instruction to refrain from awarding any damages for loss of sales to any customers outside the prescribed territory.

However, under this record, it is impossible for the jury to have been confused about the matter, or to have made any award for loss of sales to customers outside the assigned area. Plaintiff-Petitioner's position was made abundantly clear in evidence and argument. Exhibits completely detailing the claims of damages were introduced and listed the exact amounts and nature of the damages claimed. These damages totaled $121,230.02, according to an exhibit which recapped all the items of damages proved by the plaintiff. The Trial Court affirmatively instructed the jury that the Plaintiff alleged damages in the total sum of $121,230.02, and told the jury "the damages claimed does fix a maximum limit and the jury may not award Plaintiff more than the amount claimed" App. 31-32; R. 487-488. It is clear, therefore, that the jury could not possibly have heeded the Court's instructions and at the same time made an award for any element of damage not specifically comprehended by Plaintiff's damage schedules.

It is equally clear (and for the same basic reasons) that the jury could not have awarded "double damages" for any element comprehended by Plaintiff Kestenbaum's damage schedules. The trial court's instructions simply would not permit this. The fact that Mr. Kestenbaum's attorney argued that warehouse expense would be a recoverable item whether considered to be caused by

territorial restriction or by a general restraint of trade certainly could not be said to be justification for apprehension that the jury might have been persuaded to award "double damages". The Trial Court's instructions clearly point out that there may be more than one proximate cause of an event or loss, which is consistent with the teaching of *Terrell v. Household Goods Carrier Bureau*, 494 F.2d 16. The instructions also contain explicit precautionary directions against awarding more than the actual damages suffered and put a ceiling on damages which covers only the specified items set forth in Plaintiff's exhibits. Under these circumstances no "double damages" award was possible.

In summation it is clear that (1) the trial court's instructions are legally correct, and are not assailed either by Falstaff or by the opinion of the Court of Appeals; (2) the unnecessary warehouse cost was an element of damages properly recoverable upon the finding of the maintenance of an illegal territorial distribution scheme; (3) proper definition of the per se offense of territorial restriction requires that the jury be informed that it is a restriction confining sales to customers within a prescribed geographic area; (4) the evidence, particularly Kestenbaum's damage schedules, and the argument to the jury made clear that Mr. Kestenbaum made no claim for damages resulting from loss of sales to customers outside the prescribed territory, or for any element of damage not specifically comprehended by the Plaintiff's damage exhibits; and (5) the trial court's charge made it explicit that while there may be more than one proximate cause of an event or loss, the jury could not award damages for any element not specifically claimed and proved, and comprehended by the damage schedules. Accordingly, no possible error in the verdict could have resulted from the instructions relating to territorial restrictions.

Furthermore, even if the instructions were erroneous, that error was waived by Falstaff. The only objection to the Trial Court's charge relating to territorial restrictions which Falstaff made is embodied in paragraph (m), App. 37-38, R. 418-419, which reads as follows:

> "Defendant objects to the Court's charge for the reason that it fails to instruct the jury that the measure of damages on the issue of whether Plaintiff was prohibited from reselling outside the area of primary responsibility is the profit which he would have realized on any sale that he would otherwise made outside of his area of primary responsibility, less loss of profit which he would have sustained had other Falstaff distributors been permitted to sell beer to customers whom he served".

It is clear that this ojbection did not in any way, shape, form, or fashion touch upon the error which the lower court's opinion ascribes to the trial court's instructions. Accordingly, such error has been waived and was not properly preserved. The error (if any) is not such that the Court of Appeals could properly consider "sua sponte", and therefore the lower court should not have considered it.

4

Rule of Reason – Pulbic Injury

In the final section of the Court of Appeals' opinion (Section V), the conclusion is reached that a showing of "public injury" is still required in proving a general restraint or "rule of reason" violation under Section 1 of the Sherman Act.

In arriving at this conclusion, the lower Court confuses concepts relating to "public injury" and "rule of reason" in such a way that if the opinion stands, and is subsequently required to be followed in the Fifth Circuit, antitrust scholars will be able to state definitely that a showing of public injury is required in a "rule of reason" case in the Fifth Circuit, but will have trouble explaining why.

This question arose in a pecular fashion. In actuality, the observations of the lower court relating to public injury are surplusage, since the trial court instructed upon public injury, and those instructions are not attacked as being incorrect.

(Nor does the Appeals Court indicate that the proof was not sufficient to sustain a jury finding of "public injury"). However, Falstaff urged before the Court of Appeals contentions which equated proof of "public injury" with proof of specific injury to competition. The Court's opinion correctly holds that proof of specific injury to competition is not required, but then launched into a discorge which mixes and apparently uses interchangeably the concepts of "public injury", "restraint of trade", "unreasonable restraint of trade", and "rule of reason".

The Appeals Court asserts that the Petitioner contends that in a general restraint (i.e., a non-per se Section 1) case, a Plaintiff need only show a violation of the antitrust laws and damage to himself. This is not true. The rule of reason has not been abolished, and retains as much vitality now as when it was judicially engrafted upon the law by the *American Tobacco* and *Standard Oil* opinions. Petitioner has not disputed the fact that there is a greater burden of proof in a non-per se Section 1 case than where a per se violation exists. The requirements of the rule of reason must still be satisfied. The question is: What are those requirements; Petitioner only contends that the "public injury" concept has been excised from the definition of "unreasonable restraint of trade".

Klors v. Broadway-Hale Stores, Inc., 359 US 207, 3 L.Ed.2d 741, 79 S.Ct. 705 (1959) was the first major Supreme Court opinion which raised the question of the continued validity of inclusion of the "public injury" element in the "rule of reason" definition. However, its language was qualified by certain scholars and in certain opinions on the basis that it dealt with a group boycott, which is a per se violation.

Klors was followed by *Radiant Burners v. Peoples Gas, Light and Coke Co.*, 364 US 656 (1961). There the Court of Appeals had held that there was no boycot, conspiracy to boycott, or other form of per se violation shown and, therefore, the Plaintiff had the burden of proving such general injury to the competitive process that the public at large suffered economic harm (which is one method of defining the "public injury" element of the rule of reason test). The Supreme Court held that this did not accord with the decision in the *Klors* case.

Still, the argument persisted both with respect to *Klors* and *Radiant Burners* that the cases dealt with concerted refusals to deal which are per se violations. But the Supreme Court clarified its position in the case of *In The Matter of Criminal Contempt of Thomas C. McConnell,* 370 US 230. The case involved an appeal from the district court ruling that an attorney in an anti-trust case could not offer certain proof until he proved that economic injury resulted to the public. The counsel was held in contempt for making known to the court his intention to pursue the particular line of questioning which incurred the ruling. The Supreme Court reversed the ruling of the trial court, stating:

> ". . .we have held that the right of recovery of a Plaintiff in a treble damage antitrust case does not depend at all on proving economic injury to the public".

The Court cited *Radiant Burners, Klors,* and *Radovich v. N.F.L.,* 352 US 455, 1 L.Ed.2d 456, 77 S.Ct. 490 in support of this proposition.

No distinction is made with regard to per se and non-per se violations, and this language should put to rest any question about inclusion of the element of public injury in the rule of reason test.

Abundant additional support is to be found. In *Potter v. Columbia Broadcasting System,* 358 US 464 (1961) the Court said:

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will receive the same service, it has been foreclosed with this Court's decision in *Klors.*"

The case of *United States v. Greater Blouse, Etc.,* 177 F.Supp. 213, states unequivocally that *Klors* repudiated the requirement of showing public injury. *Syracuse Broadcasting Corporation v. Newhouse,* 295 F.2d 269 (2d Cir. 1961) sum-

marizes and explains at page 266-7:

> "Proof of public injury: Throughout the trial stage of this case the judge below indicated that Plaintiff, in order to make out the Sherman Act claim, must allege and prove that the alleged conspiracy was injurious to the public. In recent years, a number of courts have held that a plaintiff in a Sherman Act treble damage action must allege and prove public injury as a separate element, i.e., that the price, quality, quantity of goods offered to the public was affected by the alleged conspiracy. See, *E. G. Shotkin v. General Electric Company,* 10th Cir. 1948, 170 F.2d 236. However, in *Klores, Inc., v. Broadway-Hale Stores, Inc.,* 1959, 359 US 209, 79 S.Ct. 705, 3 L.Ed. 2d 741, the Supreme Court held that at least to those 'classes of restraint' which from their 'nature or character' are 'unduly restrictive' and hence forbidden by both the common law and statute . . . Congress (has) determined its own criteria of public harm and it (is) not for the courts to decide whether in an individual case injury (has) actually occurred. Id. 359 US at p. 211, 79 S.Ct. at p. 709.
>
> "This, in brief, was the state of the law at the time of the proceedings below, but in January, 1961, the Supreme Court decided *Radiant Burners Inc., v. Peoples Gas, Light & Coke Co.,* 1961, 364 US 656, 81 S.Ct. 365, 5 L.Ed.2d 358, where again the Court was faced with this issue. Although holding that the particular restraint involved fell within the *Klors* exception, the court further held that 'to state a claim upon which relief can be granted under (Sec. 1) allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby, are all the law equires.' This language would appear to eliminate public injury as a separate element in a Sec. 1 case." (last emphasis

added)

In the case of *Highland Supply Corporation v. Reynolds Metal Co.*, 238 F.Supp. 561 (1965), the question was raised whether public injury must be alleged in the complaint. The Court stated at p. 563:

> "In *I Toulmins Antitrust Laws*, Sec. 22.32, Supplement for 1964, at page 56, this is said about pleading Sec. 1 of the Sherman Act in private antitrust cases:
>
> > 'It has now been settled that a complaint need not allege injury to the public at large. See *Radiant Burners, Inc. v. Peoples Gas & Light Co.*, 364 US 656, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961). It has been held that this decision "would appear to eliminate public injury as a separate element in a Sec. 1 case." *Syracuse Broadcasting Corporation v. Newhouse*, 295 F.2d 269, (2nd Cir. 1961). See also discussion of *Radiant Burners* decision in 1961 *Duke, L. J.* 302, (1961).'
>
> "The 8th Circuit also cited the *Radiant Burners* case, supra, for the same proposition in its opinion in Footnote 2, 327 F.2d 725, page 727."

The last reference in the foregoing quotation is to the case of *Highland Supply Corp. v. Reynolds Metal Co.*, in which the following statement is contained in Footnote 2, at 327 F.2d 727:

> "Since the decision in *Radiant Burners, Inc. v. Peoples Gas & Light Co.*, 364 US 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961), it is not necessary to allege injury to the public in a private treble damage action."

Thus, except for the Fifth Circuit, it would appear that

the spectre of "public injury" in "unreasonable restraint" cases has been exorcised. The proper framing of the test of "rule of reason" therefore, is to be found in Justice Brandeis' opinion in *Chicago Board of Trade v. U. S.*, 246 US 231, 38 S.Ct. 242, 62 F.Ed. 683, which lays down fairly simple rules for determining whether a restraint is "unreasonable". The opinion points out that the legality of an agreement or regulation cannot be determined by so simple a test as "whether it restrains competition". Justice Brandeis stated that every agreement concerning trade, every regulation of trade, restrains. The true test of legality is whether the restraint is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. This, succinctly put, is the test of "rule of reason" and the definition of "unreasonable restraint of trade". It is the proper test to be submitted to the jury for determination of whether a non-per se violation of Section 1 exists. For the Fifth Circuit to cling to the dogma of the discredited "public injury" element of the rule of reason test is to take a giant step-backwards-in the march of progress in antitrust law.

CONCLUSION

For the various reasons set forth above, it is respectfully prayed that the Supreme Court grant a writ of certiorari and affirm the judgment of the trial court.

Respectfully submitted,

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